No. 82-139

Office - Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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JACOBY & MEYERS, a partnership,

*Appellant,*

*vs.*

SUPREME COURT OF NEW JERSEY, ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OF THE SUPREME COURT OF NEW JERSEY and NEW JERSEY STATE BAR ASSOCIATION,

*Appellees.*

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

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## MOTION TO DISMISS OR AFFIRM

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Opinion 475 of the Advisory Committee on Professional Ethics of the Supreme Court of New Jersey is reported at 107 New Jersey Law Journal 283 (April 2, 1981).

The opinion of the New Jersey Supreme Court is reported at 89 N.J. 74, 444 A.2d 1092 (N.J. April 28, 1982).

### Introduction

Appellee, New Jersey State Bar Association (hereinafter designated "NJSBA"), pursuant to 16.1(b) of the Revised Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the above entitled appeal, or, in the alternative, to affirm the judgment of the Supreme Court of New Jersey on the ground that the appeal fails to present a substantial federal question.

## I. STATEMENT OF THE CASE

Appellant, Jacoby & Meyers, a law partnership with 75 offices in California and New York, seeks review of a decision by the Supreme Court of New Jersey which prohibits it from opening a New Jersey office under the name "Jacoby & Meyers". Initially, Appellant requested an opinion from the New Jersey Supreme Court's Advisory Commission on Professional Ethics on whether the disciplinary rule in question, DR 2-102(C), permits such use of Appellant's name. The Committee decided that the plain language of the Rule, which forbids the use of law firm names "unless all those named are or were members of the bar in New Jersey", prohibits the use of

the name Jacoby & Meyers in New Jersey because neither Leonard Jacoby nor Stephen Meyers have ever been licensed to practice law in that State.[1] *New Jersey Advisory Commission on Professional Ethics* No. 475, 107 N.J.L.J. 283 (April 2, 1981) (Ethics Opinion 475). On April 3, 1981, Appellant petitioned the Supreme Court of New Jersey for review of the Advisory Committee's opinion, pursuant to Rule 1:19-8 of the Rules Governing the Courts of the State of New Jersey. The Supreme Court granted the petition, along with a motion filed by Appellee NJSBA to intervene in support of DR2-102(C).

In its Petition, Jacoby & Meyers raised, and the Supreme Court rejected, all four of Appellant's constitutional challenges to the disciplinary rule as applied to it by the Committee. Appellant argued that the Rule deprived the firm of its rights under the First Amendment, and violated the Equal Protection, Commerce, and Privilege and Immunity Clauses of the United States Constitution. With regard to the First Amendment argument, the court held that the Amendment's protection of commercial speech does *not* protect the use of the firm name "Jacoby & Meyers" in New Jersey since the use of the name that includes attorneys not licensed therein will deceive some consumers of legal services. Furthermore, the Court held that DR 2-102(D), which prohibits New Jersey attorneys from advertising on television, must also prevent New Jersey attorneys from advertising any association with Jacoby & Meyers so long as its New York offices still advertise on television channels which are received in New Jersey. Otherwise, the use of Jacoby & Meyers name in New Jersey would give the firm an unfair advantage over New Jersey firms, which must comply with the rule against television advertising.

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1. Leonard Jacoby and Stephen Meyers are members of the bar of California, where they started their law firm in 1972.

The Court rejected Appellant's Equal Protection argument because even though DR 2-102(C) discriminates against firm names containing the names of unlicensed attorneys in favor of firm names still using the names of deceased or retired partners, the discrimination is rationally related to the legitimate state goal of protecting prospective consumers of legal services.

In reply to Appellant's Commerce Clause argument, the Supreme Court reasoned that the disciplinary rule does not unduly burden Interstate Commerce in legal services by discriminating against non-residents of New Jersey, because it applies equally to all persons, resident or non-resident, who are not members of the New Jersey Bar. Finally, the Court held that DR 2-102(C) does not offend the Privileges and Immunity Clause of the United States Constitution because it does not compel unequal treatment of resident and non-residents with respect to "fundamental privileges." The Court reached this conclusion because the practice of law is not a "fundamental privilege", and furthermore because the Rule treats licensed non-resident attorneys precisely the same as licensed resident attorneys.

## II. ARGUMENT

**This appeal presents no substantial question not previously decided by this court.**

Appellee NJSBA respectfully submits that the question presented by this appeal is not substantial enough for this Court to set the case for argument. Therefore, the appeal should be dismissed, or, in the alternative, the judgment of the New Jersey Supreme Court should be summarily affirmed. Rule 16.1(b). In support of its assertion to the contrary, Appellant states that "This Court has frequently reviewed cases involving lawyers and the practice of law. . . (Citations omitted). However, this Court has never ruled on the issue presented herein." (Jurisdictional Statement, pages 21-23). Appellant thus implies that because this Court has not previously specifically addressed the issue as phrased by Appellant (J.S., page i), it must do so now. With all due respect to Appellant, this has not been the policy of this Court. Here, as in other cases where the Supreme Court has decided that full briefs and oral argument are not called for, the principles of the Court's prior decisions are controlling. This is all that is required. *Moore's Fed. Prac.* ¶512.01, citing *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 47 L.Ed. 190, 23 S. Ct. 123 (1902); *Zucht v. King*, 260 U.S. 174, 67 L.Ed. 194, 43 S. Ct. 24 (1922); *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376, 83 L.Ed. 231, 59 S. Ct. 259 (1939); *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 96 L.Ed. 1022, 72 S. Ct. 842 (1952). The following is as brief a discussion as possible of the reasons why the issue presented herein is clearly foreclosed by this Court's prior decision.

### A. *First Amendment*

Appellant contends that the New Jersey Supreme Court erroneously relied upon this Court's 7-to-2 deci-

sion in *Friedman v. Rogers*, 440 U.S. 1, 99, 59 L.Ed. 2d 100 S. Ct. 877, (1979) in finding that DR 2-102(C) does not violate Jacoby & Meyers' right to free speech guarantees under the First and Fourteenth Amendments (J.S., pages 26-26). As Appellant points out, this Court's main reason in that case for upholding a Texas statute prohibiting the use of trade names by optometrists was the local history of abuse and deception of consumers. Appellant therefore concludes that since the New Jersey Supreme Court made no reference to any such history of deception or abuse in New Jersey or elsewhere, only to hypothetical problems, the real purpose of the Disciplinary Rule must be to protect New Jersey lawyers from competition.[1] (J.S., pages 27-30). In support of this irrational conclusion, Appellant points to a statement made by the New

1. Appellant's other basis for this conclusion is that DR 2-102(B) also permits deception by allowing the names of deceased New Jersey law partners to be left in a firm's name. (J.S., pages 33-34). Appellant fails to recognize the basis for the distinction, which unfortunately may not be apparent from the face of the rule. However, the Supreme Court of New Jersey has ruled that a firm letterhead, etc. must indicate the status of a deceased partner whose name is retained. Ethics Opinion No. 25 (1979). This, of course, leaves no doubt in the mind of a potential client at least as to whom will *not* handle his case. In contrast, indicating on the letterhead of a firm doing business in New Jersey that, eg., Messrs. Jacoby & Meyers are members of the "California Bar only" does *not* make it clear to a lay person that neither attorney will have any involvement with his or her case. The average individual simply does not possess that level of understanding of the rules governing admission to practice. Moreover, even if there is no rational basis for the distinction made by DR 2-102(B) and DR 2-102(C), this does not mean that DR 2-102(C) alone may not be upheld. As this Court noted in *Semler v. Oregon State Bd. of Dental Examiners*, 295 U.S. 608, 610, 79 L.Ed. 1086, 55 S. Ct. 570, 571 (1935), "The State [is] not bound to . . . strike out evils at the same time or in the same way." In other words, [R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical*, 348 U.S. 483, 489, 99 L.Ed. 563, 75 S. Ct. 461, 465 (1955).

Jersey Supreme Court in the context of its introductory remarks about television advertising.[2] The NJSBA emphatically denies the truth of Appellant's contention. Not only is it frivolous, but it is based upon a gross distortion of the record. In addition, Appellee respectfully asserts that the principles enunciated by this Court in *Friedman* and other cases are dispositive of case at bar.

Appellant bases its conclusion that DR 2-102(C) is specifically designed to prevent out-of-state competition on the following remark by the New Jersey Supreme Court, taken entirely out of context:

> ". . .We do know that if petitioner were allowed to use its firm name in New Jersey in *any* form its television advertising could give it a substantial competitive advantage." (J.S., page 34) (emphasis theirs).

In truth, the Supreme Court was expressing its concern over the unfair competition which would occur if Appellant were permitted to operate in New Jersey under the name of Jacoby & Meyers. Because Jacoby & Meyers advertises on New York television channels which reach New Jersey consumers, the firm would have an unfair advantage over New Jersey lawyers, who must comply with the rule against television advertising. In fact, the real purpose of DR 2-102(C) is not to prevent competition but to prevent deception of consumers of legal services. And although competition, as Appellant argues, is not something the State of New Jersey has a "substantial legitimate governmental interest" in preventing (J.S., page 35), *deception* most certainly is.

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2. At the outset of its opinion, the New Jersey Supreme Court noted that in order to permit its recommended full evaluation of DR 2-102(C), the Court's ban on television advertising in DR 2-102(D) should also be considered.

As the New Jersey Supreme Court emphasized and Appellant conceded, the use of a law firm name is a form of commercial speech and nothing more. In re *Professional Ethics Advisory Committee Opinion 475*, 89 N.J. 74 (1982), citing *Friedman v. Rogers*, 440 U.S. 1, 59 L.Ed. 2d 100, 99 S. Ct. 887 (1979). Although this Court has recognized that commercial speech warrants *some* constitutional protection, *Virginia Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 48 L.Ed. 2d 346, 96 S. Ct. 1817 (1976) (holding that the State of Virginia could not prohibit *all* advertising by pharmacies of prescription drug prices), it has *never* afforded it the degree of protection which accompanies political expression. For example, in *Central Hudson Case v. Public Service Commission*, 447 U.S. 557, 2350 65 L.Ed. 2d 341, 563, 100 S. Ct. 2343 (1980), this Court stated that "there can be no constitutional objection to the suppression of commercial messages . . . more likely to deceive the public than inform it." See also, *Virginia Pharmacy, supra* "[A] different degree of protection is necessary to insure that the flow of the truthful and legitimate commercial information is unimpaired." 425 U.S. at 771, note 24, 96 S. Ct. at 1830, note 24. Accordingly, the New Jersey Supreme Court, which regards law firm names as "official" designations and therefore regulates them more carefully than ordinary advertising, seeks merely to insure that the official status of an attorney as one licensed to practice in New Jersey is conveyed to the public with accuracy and clarity. See *In re Professional Ethics Opinion 447*, 86 N.J. 473 (1981) citing *Central Hudson Gas, supra*.

The position taken by the New Jersey Supreme Court and the NJSBA is further supported by two recent cases decided by this Court, *Friedman v. Rogers, supra* and *In the Matter of RMJ*, 50 U.S.L.W. 4185 (January 25, 1982). In *Friedman*, the Court noted that not even

all types of *commercial* speech are entitled to identical constitutional protection. For example, the Court distinguished the objective and easily verifiable price information at issue in *Virginia Pharmacy, supra* (prescription drug prices) and *Bates v. State Bar of Arizona*, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S. Ct. 2691 (1976) (prices of routine legal services) from the potentially more misleading information conveyed through the use of a trade name. The speech involved in the former two cases is self-explanatory, however, in the latter case "there is a significant possibility that trade names will be used to mislead the public." 440 U.S. at 12-13. Similar to what the New Jersey Supreme Court did in upholding DR 2-102(C), in *Friedman*, this Court balanced the value of trade names against their potential to mislead and found no alternative but to uphold the prohibition against the use of trade names by optometrists. As the New Jersey Supreme Court pointed out, "It is precisely the potential for misleading the public through 'ill-defined associations' inherent in trade names which Disciplinary Rule 2-102(C) seeks to address and which the use of the firm name Jacoby & Meyers might engender". *In re Professional Ethics Advisory Committee Opinion 475*, 89 N.J. at 74, 85 (1982).

The other pertinent case, *In the Matter of RMJ*, in which this Court invalidated an unrelated restriction placed on attorney advertising by the State of Missouri, likewise emphasized that the states may constitutionally prohibit both inherently misleading advertising and advertising that experience has shown is subject to abuse. 50 U.S.LW at 4188-4189. Again, this is precisely what the Supreme Court of New Jersey is trying to do.

As a final note—although the argument is not raised by Appellant in its Jurisdictional Statement—the NJSBA desires to point out that allowing Appellant to use the name Jacoby & Meyers in New Jersey, but requiring the

two named partners to use some sort of disclaimer stating that neither of them are members of the New Jersey bar, would be a more confusing rather than less restrictive alternative. More likely than not, it would even increase the potential for deception by, for example, implying to prospective clients an official disapproval of the firm's practice (See Footnote 1, *supra*). With or without a disclaimer, the use of a firm name in New Jersey that includes attorneys not admitted to the New Jersey bar is certain to deceive some people. Such use of Jacoby & Meyers name has already caused problems elsewhere.[3]

B. *Equal Protection Clause*

Appellant argues that the New Jersey Supreme Court erred in not applying the strict scrutiny test to its rules which distinguish between deceased partners and out-of-state attorneys with respect to law firm names.[4] (J.S., pages 41-42). In Appellant's words,

> "The New Jersey Supreme Court arrived at the wrong conclusion because it applied the wrong standard of review. The Court assumed that there is no free speech interest in a trade name and simply applied the rational basis test which is used to analyze statutes which do not involve fundamental rights or do *not* make distinctions on the basis of suspect classifications." (J.S. pages 39-40) (Emphasis theirs).

With all due respect, the Court assumed no such thing. As this Court has ruled and as Appellant concedes (J.S., page 41), commercial speech is entitled to less protection

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3. Messrs. Jacoby & Meyers recently lost their motion to dismiss an action filed in the New York State Supreme Court by the New York Criminal and Civil Courts Bar Association, charging them with misrepresenting themselves as attorneys licensed to practice in New York. *N.Y. Law J.*, April 5, 1982, at 12.

4. See footnote 1, *supra*.

under the First Amendment than the type of political speech involved in *Police Department v. Mosley*, 408 U.S. 92, 33 L.Ed. 2d 212, 92 S. Ct. 2286 (1972), which appellant asserts provides the correct standard of review for this case. See *Friedman v. Rogers*, 440 U.S. 1, L.Ed. 2d 100, 99 S. Ct. 887 (1979). Appellant, relying on *Mosley*, would nevertheless have us believe that wherever "free speech is implicated, the statute is to be subject to strict scrutiny." (J.S., page 38) The NJSBA respectfully submits that this is not the law as this Court has decided it. In *Mosley*, this Court struck down as violative of the Equal Protection Clause an ordinance prohibiting picketing near schools *except* by organized labor. The Court noted, as Jacoby & Meyers does, that "the Equal Protection Claim" was "closely intertwined with First Amendment interests. . ." (J.S., page 38-39, citing 408 U.S. at 95, 33 L.Ed. 2d at 216, 92 S.Ct. at 2286 (1972). However, the fact that an Equal Protection claim involves consideration of First Amendment interests does not change the rule that commercial speech is less protected and therefore any regulation thereof is not subject to strict scrutiny. Accordingly, there is no need for this Court to consider whether the strict scrutiny analysis of *Mosley*, *supra*, should be applied to commercial speech, it having already determined the applicable principles in previous decisions.

Appellant makes an alternative argument that even under the rational basis test, which was correctly applied by the New Jersey Supreme Court, the disciplinary rule is invalid. (J.S., page 45, footnote 9). The rational basis test applies to DR 2-102(C) because it neither infringes upon a fundamental right nor burdens a suspect class of individuals. As the New Jersey Supreme Court pointed out,

> "Certainly, lawyers who are not licensed to practice in New Jersey do not constitute a suspect class such

> as race, religion or alienage deserving of extraordinary protection under the Equal Protection Clause. (citation omitted) Nor is the right to use one's law firm name of fundamental importance in our ordered schemo of liberties." *In Re Professional Ethics Advisory Committee Opinion 475*, 89 N.J. 74, 94-95.

Contrary to what Appellant believes, there *is* a rational basis for distinguishing between the use of names of deceased or retired partners and the use of names of persons who have never been licensed to practice law in New Jersey. (See footnote 1, *supra*) The Rule is rationally related to New Jersey's goal of protecting prospective consumers of legal services, which is all that is required to satisfy the rational basis test. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 66 L.Ed. 2d 659, 101 S. Ct. 715 (1981).

C. *Commerce Clause*

Appellant's position is that the Commerce Clause issue simply amounts to a question of whether or not a state may constitutionally adopt rules for lawyers which are designed to protect them from out-of-state competition. (J.S., page 46). In short, Appellant's answer to that question is that statutes enacted for the purpose of protecting local economic interests are virtually *per se* invalid. (J.S., page 47, citing *Philadelphia v. New Jersey*, 437 U.S. 617, 57 L.Ed. 2d 475, 98 S. Ct. 2531 (1978)). The NJSBA concedes that if this were in fact the design of DR 2-102(C), this Court might see fit to invalidate it. However, the rule is *not* designed to prevent out-of-state competition, despite the unreasonable inferences Appellant draws by taking the New Jersey Supreme Court's remarks about television advertising out of context. (See discussion in Part A, *supra*). Again, the Supreme Court was merely expressing its concern over the unfair compe-

tition which would occur if appellant were allowed to use the name Jacoby & Meyers in New Jersey, due to the fact that Appellant advertises on New York television channels which are seen by New Jersey consumers, while New Jersey firms are prohibited from advertising on television. In fact, as discussed previously, the purpose of the rule is to prevent deception.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 44 L.Ed. 2d 572, 95 S. Ct. 2004 (1975), wherein it was recognized that legal services are part of interstate commerce, this Court was careful to emphasize that it intended "no diminution of the authority of the State to regulate its professions." *Id.*, 421 U.S. at 793, 44 L.Ed. 2d at 588, 795 S. Ct. at 2016 (J.S., pages 45-46). Accordingly, this Court has held that under the Commerce Clause the "crucial inquiry" is whether the law is "basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey, supra*, 437 U.S. at 625, 57 L.Ed. 2d at 482, 98 S. Ct. at 2538 (1978). We have already shown that DR 2-102(C) is not basically a protectionist measure and that it can fairly be viewed as a law directed to the legitimate state concern of preventing deception of consumers of legal services. Moreover, in compliance with this Court's ruling in *Philadelphia*, DR 2-102(C) does not discriminate against interstate commerce. There is no discrimination because the disciplinary rule treats licensed non-resident attorneys the same as licensed resident attorneys. See also, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L.Ed. 2d 852, 80 S. Ct. 813 (1960).

Alternatively, even if the rule is directed against interstate commerce, it clearly satisfies the two-part balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 25 L.Ed. 2d 174 90 S. Ct. 844 (1970). See also, *Southern*

*Pacific Co. v. Arizona*, 325 U.S. 761, 89 L.Ed. 1915, 65 S. Ct. 1515, (1944). Applying that test, DR 2-102(C) is (1) rationally related to a legitimate state concern (again, preventing deception) and (2) whatever discrimination results is outweighed by New Jersey's interest in enforcing the rule. As the New Jersey Supreme Court emphasized, "The State's paramount interest in preventing deception in the practice of law overrides any incidental effect the rule might have on interstate commerce". *In Re Professional Ethics Advisory Committee Opinion 475*, 89 N.J. 74, 91.[5]

D. *Privileges and Immunities Clause*

Appellant agrees that the New Jersey Supreme Court was correct in stating that:

> "The Privileges and Immunities Clause insures that non-residents and residents receive equal treatment with respect to 'fundamental' *activities* whose restriction would 'hinder the formation, the purpose, or development of a single union'." (J.S., pages 49-50) (emphasis added).

In Appellant's view, however, this case turns on the issue of whether a law firm has the right to use the same name in more than one jurisdiction and not, as the New Jersey Supreme Court viewed it, on whether the practice of law

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5. Appellee wishes to remind the Court that it has upheld bar rules which burden interstate legal practice substantially more than DR 2-102(C). For example, in *Wilson v. Wilson*, 416 F. Supp. 984 (D.R. 1976), affirmed *mem.*, 430 U.S. 925, 97 S. Ct. 1540 51, L.Ed. 2d 768 (1977), this Court upheld an Oregon bar rule requiring that bar applicants declare their intention to become Oregon residents at the time of admission. In *Aronson v. Ambrose*, 366 F. Supp. 37 (DVI 1972), affirmed, 479 F2d 75 (3rd Cir.), *cert. den.*, 414 U.S. 854 (1973), this Court upheld a rule requiring all Virgin Island attorneys to be domiciled there.

is a fundamental privilege. The NJSBA submits that this argument is so lacking in substance as to be frivolous.

Appellant presents no authority for the proposition that the right to use its firm name in New Jersey is a "fundamental" privilege guaranteed by the Privileges and Immunities Clause. In reality, this Court has never held that to be the case. Furthermore, since the clause only insures equal treatment with regard to *fundamental* activities and the practice of law is not a fundamental activity, the clause does not guarantee the use of a name in connection therewith. See *Leis v. Flynt*, 438 U.S. 438, 58 L.Ed. 2d 717, 99 S. Ct. 698 (1979), (where this Court rejected the Privileges and Immunities Clause argument raised by individual New York lawyers who were refused permission to represent a defendant in an Ohio state criminal case). Moreover, as the New Jersey Supreme Court pointed out, DR 2-102(C) treats licensed non-resident attorneys precisely the same as licensed resident attorneys, which is all the Privileges and Immunities Clause requires. Non-resident attorneys have greater difficulty using their firm name in New Jersey only to the extent that they may face greater difficulty satisfying the requirements for being admitted to the New Jersey bar or continuing to practice in that state. However, those types of requirements have been upheld by this Court. *In Re Professional Ethics Advisory Committee Opinion 475*, 89 N.J. 74, 94, citing *Leis v. Flynt, supra; Wilson v. Wilson*, 416 F. Supp. 984 (D. Or. 1976), affirmed *mem.* 430 U.S. 925, 51 L.Ed. 2d 768, 97 S. Ct. 1540 (1977).

## III. CONCLUSION

For all of the foregoing reasons, Appellee moves that this appeal be dismissed or the decision of the Supreme Court of New Jersey be affirmed.

Respectfully submitted,

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